United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1300

Docket No. 76-1300

B
P/S

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA

Plaintiff-Appellee,

V.

DELIA AGUILAR SAN JUAN

Defendant-Appellant

BRIEF OF DEFENDANT—APPELLANT DELIA AGUILAR SANJUAN

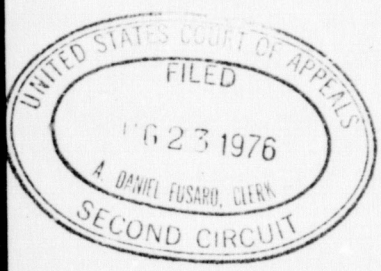

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Constitutional, Statutory and Regulatory Provisions Involved	vii
Questions Presented	viii
Preliminary Statement	1
Statement of the Case	2
Statement of Facts	5
Argument	
POINT I.—Title 31 U.S.C. Sections 1101(a) and 1101(b) and the regulations thereunder 31 C.F.R. Sections 103.23(a) and 103.25(b) of the Bank Secrecy Act of 1970 violate on their face and as applied the Constitution of the United States in that:	
(a) they violate the command of the Fifth Amendment against self-incrimination, and	7
(b) they violate the Due Process Clause of the Fifth Amendment because they are vague and do not provide for fair notice	14
(c) they violate the First Amendment guarantee of freedom of association and right of privacy of belief and association	

Table of Contents

Page

POINT II.—The District Court committed prejudicial error in denying defendant's motion to dismiss the information under 12(b)(2) of F.R.Cr.P. It also committed prejudicial error in denying defendant's motion for judgment of acquittal at the close of the government's case. Both claims of error are predicated on the statements, both written and oral, made repeatedly by the government that the violation with which the defendant was charged occurred on the bus when she failed orally to declare the money in her possession..... 24

POINT III—The District Court committed prejudicial error in failing to hold that the search and seizure of the currency and the documents was in violation of the Fourth Amendment guarantee against unreasonable searches and seizures and that the seizure was unauthorized by the statute or any regulations. Evidence about the currency and the documents should have been suppressed and they should have been returned to the defendant..... 33

POINT IV

(a) The District Court committed prejudicial error in admitting over defendant's objection, Government Exhibits 3 and 13 in that their potential for unfair prejudice and confusion of the issues far outweighed their probative value..... 41

(b) It was prejudicial for the District Court to fail to charge in accordance with defendant's Request No. 6 on the issue of willfulness..... 43

Conclusion..... 45

TABLE OF AUTHORITIES

Cases Cited

Page

Aptheker v. Secretary of State, 378 U.S 500, 84 S.Ct. 1659, 12 L Ed 2d 992 (1964)..... 12

Baggett v. Bullitt, 377 U.S. 360, 367, 84 S.Ct. 1316, 12 L Ed 2d 377..... 18

Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed 2d 639 (1971).....

Blau v. United States, 340 U.S. 159..... 12

Buckley v. Valeo U.S., S.Ct. 46 L Ed 2d 659 (1976)..... 19,21,22,23

California Banker's Asso. v. Schultz, 416 U.S. 21, 39 L Ed 2d 812, 94 S.Ct. 1494(1974)..... 7,8,11,20

California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L Ed 2d 9 (1971)..... 10

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L Ed 543 (1925)..... 12

Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L Ed 322..... 18

Demetree v. U.S., 207 F.2d 892 (5th Cir., 1953)..... 30

Grosso v. United States, 390 U.S. 62, 88 S.Ct. 722, 19 L Ed 2d 906 (1968)..... 9

Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L Ed 2d 923 (1968)..... 9,11

Table of Authorities

	Page
Henriques v. Imm. & Nat. Service, 465 F. 2d 119 (2d Cir. 1972)	30
Hernandez v. U.S., 352 F.2d 240 (9th Cir., 1965)	30
Hoffman v. United States, 341 U.S. 479	12
Kent v. Dulles 357 U.S., 116, 78 S.Ct. 113, 2 L Ed 2d 1204 (1958)	12
Lacqui v. Imm. & Nat. Serv., 422 F.2d 807 (7th Cir. 1970)	13
Lambert v. California, 355 U.S. 255, 78 S.Ct. 240, 2 L Ed 2d 228(1957)	17
Leary v. United States, 397 U.S. 6, S.Ct., L Ed (1968)	11
Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L Ed 2d 889 (1968)	9,10
NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L Ed 2d 1488 (1958)	19
Shelton v. Tucker, 364 U.S. 479 (1960), 81 S.Ct. 247, 5 L Ed 2d 231(1960)	19
Talley v. California, 632 U.S. 60 (1960)	19
Twining v. United States, 211 U.S. 78	12
U.S. v. Bishop, 412 U.S. 346, 361 (1973)	44
U.S. v. Bowie, 360 F.2d 1 (2d Cir. 1966)	42
United States v. Brodzik, 336 F. S. 295	40

Table of Authorities

	Page
U.S. v. Brawer, 482 Fed 117 (2d Cir. 1973).....	31
U.S. b. Burch, 490 F.2d 1300 (8th Cir., 1974).....	42
U.S. v. Gentile 539 F.2d 461, 470 (2d Cir. 1976).....	44
U.S. v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L Ed 2d 99, 107(1975).....	42
United States v. Glaziou, 402, F.2d 8 (2d Cir. 1968) *cert. den* 393 U.S. 1121.....	36,37
United States v. Hill, 430 F.2d 129 (5th Cir. 1970)..	36
U.S. v. Jones, 368 F.2d 795 (2d Cir., 1966).....	17
United States v. Mancuso, 420 F.2d 5661 (2nd Cir. 1970).....	16,17
United States v. Murdoch, 290 U.S. 389 (1933).....	44
United States v. Murray, 297 F.2d 812, 819 (2d Cir. 1962).....	30
U.S. v. Neff, 212 F.2d 297, 309 (3rd Cir. 1954).....	30
U.S. v. San Juan, 405 F.Supp. 686 (1975).....	3,7,11,22
United States v. Vaught, 434 F.2d 124 (9th Cir., 1970) cert. den. 401 U.S. 976(1971).....	13
Warden v. Hayden, 387 U.S. 294,____ S.Ct. ____, 18 L Ed 2d 782.....	40

Statutes

	Page
18 U.S.C. § 1407	16
26 U.S.C. §§ 7201, 7203, 7206(1)	10
31 U.S.C. 1051	1,7,9
1058	1
1101(a)	1,2,7,8,14,22
1101(b)	1,7,8,14,22
1102	38

Rules

Federal Rules of Criminal Procedure	
Rule 12(b)(2)	3,25,29,31
Federal Rules of Evidence	
Rule 403	42

Regulations

19 C.F.R. § 148.13	16
31 C.F.R. Part 103	
Section 103.21	7
Section 103.23	9
Section 103.23(a)	2,7,8,9,14
Section 103.23(b)	9,14
Section 103.25	10
Section 103.25(b)	2,7,8,9,14,16
Section 103.49	8
Section 103.23c	11
Section 103.25(d)	9
Section 103.48	39

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, First Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Constitution of the United States, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Fifth Amendment:

> . . . [N]or shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Bank Secrecy Act, Public Law 91-508, Title II, 31 U.S.C. §§ 1051-1122 and the Regulations promulgated thereunder, 31 C.F.R. § 103 (1972), insofar as applicable, are set forth in the addendum to this brief.

QUESTIONS PRESENTED

1. Whether Title 31 U.S.C. Section(s) 1101(a) and 1101(b) and the regulations thereunder 31 C.F.R. Sections 103.23(a) and 103.25(b) of the Bank Secrecy Act of 1970 violate the Fifth Amendment privilege against self-incrimination and the Due Process Clause of that amendment.

2. Whether the statute and the regulations thereunder violate the First Amendment guarantee of freedom of association and the right of privacy of belief and association.

3. Was it reversible error for the District Court to deny defendant's motion to dismiss under Rule 12(b)(2) of the F.R.Cr.P. and also to deny defendant's motion for judgment of acquittal when in effect the Government had particularized the information by repeatedly claiming that the violation of the statute occurred on the bus when defendant orally failed to declare that she had more than $5,000 in her possession?

4. Was it reversible error for the Court to fail to suppress the currency and the documents seized from the defendant in violation of the Fourth Amendment guarantee against unreasonable searches and seizures and when the statute or regulations did not authorize the seizure?

5. (a) Was it reversible error for the District Court to admit Government Exhibits 3 and 13 over defendant's objection that they were clearly prejudicial and would serve to create confusion of the issues?

   (b) Did the District Court commit reversible error when, on the issue of willfulness, it failed to charge in accordance with defendant's Request No. 6?

Docket No. 76-1300

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DELIA AGUILAR SAN JUAN

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BRIEF OF DEFENDANT—APPELLANT DELIA AGUILAR SAN JUAN

PRELIMINARY STATEMENT

This is an appeal by defendant, Delia Aguilar San Juan, a citizen of the United States, from a judgment of conviction in the United States District Court for the District of Vermont, following a trial by jury before Albert J. Coffrin, District Judge, for violation of §§1058 and 1101 (a) of Title 31 U.S.C. Judgment was entered on June 21, 1976 (A.108)*. Notice of appeal was filed the same day (A.109). Mrs. San Juan was sentenced to one year in jail with execution suspended after 30 days with probation to follow for a period of 3 years. Sentence was stayed pending the result of this appeal (TRd. 19, 20)**.

* Reference "(A.108)" is to defendant's Appendix.

** Reference "(TRd 19,20)" is to the transcript dated June 21, 1976; reference "(TRa)" *infra* is to the transcript dated October 29, 1975; reference "(TRb)" *infra* is to the transcript dated January 19, 1976; reference "(TRc)" *infra* is to the transcript dated March 9-11, 1976.

STATEMENT OF THE CASE

On June 26, 1975, the defendant was indicted for violation of §§ 1101 (a) and (b) and § 1058 of Title 31, U.S.C. in that, in substance, she had, on or about March 30, 1975, transported $77,500 in currency from Canada into the United States without filing a report required by 1101(b).

On motion (A.3), the indictment was dismissed and superceded by an information dated October 22, 1975 (A.4). The information charged violation of the same sections of Title 31, U.S.C. but added violations of 31 C.F.R. §§ 103.23 (a) and 103.25 (b) of the regulations enacted pursuant to the statute. Mrs. San Juan pleaded not guilty to both the indictment and the information.

Objections to the indictment on the ground that Sections 1101 (a) and (b) were unconstitutional under the First, Fourth, Fifth and Sixth Amendments to the Constitution of the United States, which had previously been filed by the defendant were by agreement made applicable to the information (TR.a.4).

In addition, the defendant on October 25, 1975, moved (A.5) for the suppression as evidence and return of the $77,500 and certain documents seized from her on March 30, 1975, by Customs inspectors in the Inspection Station at Highgate Springs, Vermont. She had been led to the Inspection Station from a bus on which she was a passenger passing from Canada to the United States at Highgate Springs.

An evidentiary hearing on defendant's suppression motion was held on October 29, 1975 (A.7-A.51). On November 12, 1975 defendant filed a Memorandum in support of her motion (R. Document 26.)* The government's memorandum dated November 12, 1975 (R. Document 28) in opposition to defendant's motion stated for the first time, its theory of the case and its interpretation of the statute and regulations viz., that the violation charged in the information occurred on the bus on which Mrs. San Juan was a passenger.[1]

The District Court overruled defendant's claim that the statute and regulations were unconstitutional and in addition denied defendant's suppression motion. The opinion of the District Court, dated December 29, 1975, is reported in *U. S. v. San Juan*, 405 F.S. 681.

In view of the Government's theory of the case and interpretation of the statute and regulations pursuant thereto, the defendant on January 5, 1976, moved to dismiss the information under Rule 12 (b) (2) of F.R.Cr.P. on the ground that the information when read together with the government's claim of the locus of the violation did not set forth an offense under the statute (A.54). The district court after oral argument denied the motion and in addition denied defendant's oral motion for a Bill of Particulars (A.58).

A jury was duly impaneled and sworn on March 9, 1976. After a preliminary *voir dire* on the voluntariness of certain statements claimed by the government to have been made by Mrs. San Juan in the Inspection Station of the customs house, the court

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* Reference "R." is to the record.

[1]This statement by the government was consistently repeated as we shall show in detail under Point II, *infra*.

ruled the statements voluntary and denied defendant's motions to suppress them (TRc.94).

The government then proceeded to present its evidence to the jury. During the course of the trial the admissibility of certain letters (Gov. Exhibits 3 and 13, TRc. 274-276) was objected to by defendant. The court admitted them after argument.

After the government rested, the defendant made a motion for judgment of acquittal (A.78). One of the grounds for the motion was briefly that government's claim that Mrs. San Juan violated the statute and the regulations on the bus did not constitute a crime thereunder. The district court denied defendant's motion for judgment of acquittal.

The defendant did not take the stand nor did she present any witnesses on her behalf. After written requests to charge were submitted both by the defendant and the government, the court charged the jury (A.95) which returned a guilty verdict.

The defendant thereafter filed a motion for a Judgment of Acquittal Notwithstanding the Verdict (A.107) and a memorandum in support thereof (R. Document No.40). The district court denied the motion and sentenced the defendant as aforesaid.

STATEMENT OF THE FACTS

On May 30, 1975, Mrs. San Juan was one of seven or eight passengers on a bus coming from Canada into the United States through the port of entry at Highgate Springs, Vermont. At or about 9:15 A.M. Robert M. Johnson, a customs inspector whose primary duty was to see to it that neither contraband nor dutiable goods were brought into the United States (TRc. 133) came onto the bus and after enquiring of Mrs. San Juan as to where she lived and checking her United States passport, asked whether she acquired or purchased any items in Canada that she was bringing back (TRc. 105, 151). She replied that she had bought some chocolate for her children. Johnson did not at any time ask her whether she had money with her in excess of $5,000 (TRc. 138), nor did Mrs. San Juan ever refer to money in her conversation with Johnson on the bus (TRc. 105-106). At no time, either on the bus or subsequently, did Johnson present Mrs. San Juan with Defendant's Exhibit A (Customs Declaration Form 6059-B) (TRc. 131).[2] Mr. Johnson then proceeded to examine a piece of luggage which accompanied Mrs. San Juan. He asked her to open it which she did. Mr. Johnson observed a couple of brown packages which Mrs. San Juan said were her books. He examined the baggage of others on the bus and then came back to Mrs. San Juan and told her that he wanted to examine the baggage further and asked that she accompany him to the customs house, a short distance away.

Inside customs, Johnson put Mrs. San Juan's baggage on the counter behind which there was another

[2] In pertinent part, the Customs Declaration reads as follows:

"10. Are you or anyone in your party carrying over $5,000 in coin, currency or monetary instruments?" Boxes are provided for a "Yes" or "No" answer.

inspector — Joan McClatchey — and Johnson discovered two brown packages in the bag, one of which contained nine envelopes, two of which were open, the others sealed (TRc. 113, 171). Mrs. San Juan opened the other brown package in which there was a large sum of money and said: "Oh my God, no." (TRc. 114, 142).

Mr. Johnson seized the money and the envelopes and took them to the Port Director, Mr. Scott, who found that the money amounted to $77,500 in currency. The currency was never returned to Mrs. San Juan (TRc. 139, 202).

Mrs. San Juan was then led to the inspection room in the customs house where Johnson presented her with Form 4790 (Court Exhibit 1; A.52) and asked her to fill it out. She did not do so. Neither on the bus nor in customs did Mrs. San Juan show any evidence of knowing anything about the existence of Form 4790, or of the reporting requirements prior to the time the form was presented to her by Johnson for completion (TRc. 164,165). Thereafter and for a period of approximately 3½ hours she was questioned by Inspector McClatchey and Richard F. Mercier, a Special Agent for the United States Customs Service. Mercier also asked her to fill out the Form. During the interrogation Michael J. Consavage, another Special Agent for Customs, was also present. Mrs. San Juan at various times asked for permission to telephone her husband which was denied her. She also said she wanted a lawyer to clarify the Form for her. This too was denied her. At the end of the interrogation, Mercier told Mrs. San Juan that whether she signed the Form or not the government was keeping the money (TRc. 259) and that she had been offered enough time to fill it out. Mrs. San Juan left the customs area for her home at approximately 3:30 P.M., March 30, 1975.

ARGUMENT

POINT I(a)

Title 31 U.S.C. Sections 1101(a) and 1101(b) and the Regulations thereunder 31 C.F.R. Sections 103.23(a) and 103.25(b) of the Bank Secrecy Act of 1970 violate on their face and as applied the Constitution of the United States in that they violate the command of the Fifth Amendment against self-incrimination.

The Bank Secrecy Act of 1970 empowers the Secretary of the Treasury to promulgate regulations requiring recordkeeping and reporting of a wide range of domestic and foreign monetary transactions. Criminal penalties attach upon willful violations of the regulations. The Act has as its primary goal the enforcement of criminal law. H.R. Rep. No. 91-975, 91st Cong. 2d Sess. 10; 1970 U.S. Code Cong. and Admin. News 4395, 4404, 4407. The stated purpose of the Act and the regulations is to obtain financial information having "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 1051; 31 C.F.R. 103.21.

In connection with the stated purposes of the Act and regulations the Supreme Court in *California Bankers Assn. v. Schultz*, 416 U.S. 21, 94 S.Ct. 1494 39 L Ed 2d 812 (1974) noted, (94 S.Ct. 1525) that " . . . [c]oncern for the enforcement of the criminal law was undoubtedly prominant [sic] in the minds of the legislators who considered the Act". And in *U.S. v.*

San Juan, 405 F.S. *supra*, 686,693, the District Court stressed the "fundamental prosecutorial" purposes of Congress in promulgating the foreign reporting requirements set forth in the Act and regulations.

At issue in this case is Title II, Sec. 231 of the Act, 31 U.S.C. §§ 1101 (a) and 1101 (b) and 31 C.F.R. §§ 103.23 (a) and 103.25 (b) which require persons acting whether as principal, agent or bailee, or by agent or bailee to report the transportation of currency and instruments exceeding $5,000 in amount into or out of the country. Willful failure to file a report is punishable under 31 U.S.C. § 1058 and § 31 C.F.R. 103.49. The Act and regulations require the Secretary to make the reported information concerning transactions available to any other department or agency of the federal government upon request if it is consistent with the aims of the Act. The constitutionality of various provisions of the Act were before the Supreme Court in *California Bankers Association v. Schultz, supra.* Because it determined that the constitutional violations of the Fifth and First Amendment claims asserted against §§ 1101 (a) and (b) and the regulations thereunder were premature, the Court did not resolve those issues.

§ 1101(b) of Title 31 grants the Secretary of the Treasury broad authority to require disclosures concerning import or export of sums of money in the amount of $5,000 or more in a single transaction. These include disclosures of the legal capacity in which the transporter is acting with respect to the money; the origin, destination and route of the transportation; the identities of the person from whom the money is received or to whom it is to be delivered, or both, if the transporter is not the owner; and the amounts and types of the instruments.

Under 31 C.F.R. § 103.23(b) a report of a *recipient* must disclose the amount, date of receipt, the form of the instrument, and the person from whom the instrument is received. This information is required *only* of the recipient and not the transporter of the monetary instruments. A transporter is required by 31 C.F.R. § 103.23 (a) only to "make a report thereof". 31 C.F.R. § 103.25 (d) does not set forth the nature of the disclosures to be made under § 103.23 (a) by a transporter. It merely provides that the form to be used in making the reports required by § 103.23 may be obtained from any Internal Revenue office and also may be obtained from any office of the Bureau of Customs.

The central standard for the application of the privilege is whether the claimant is confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination. *Marchetti v. United States*, 390 U.S. 39,53 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968). The articulated purpose of the Act, disclosed both by the legislative history and the text, is to enforce the criminal laws and combat organized crime. 31 U.S.C. § 1051; 1970 U.S. Code Cong. and Admin. News 4395, 4404, 4407. To facilitate this end, Congress believed that forced disclosure of information with regard to monetary instruments in the amount of more than $5,000 would have a "high degree of usefulness."

Persons making such reports can reasonably expect that disclosure of the information sought will significantly enhance the likelihood of their prosecution for past and future acts, and that the report will provide evidence which will facilitate their conviction.

Certainly, since the Act and the regulations require or permit the Secretary to make available the reported disclosures to other departments or agencies apprehension that such disclosures will facilitate, or supply evidence leading to conviction, is "real and appreciable." *Brown v. Walker*, 161 U.S. 591, 599 (1896). Under 26 U.S.C. §§ 7201, 7203 and 7206 (1) for example, the required disclosures could lead to severe penalties for tax evasion or perjury. These are indeed "substantial hazards of incrimination." *California v. Byers*, 402 U.S. 424, 429 (1971).

It is important to re-emphasize that the reporting requirements of the Act and regulations are not essentially non-criminal or regulatory in nature. Their declared and primary objective is to enforce the criminal law. What Mr. Justice Brennan said, concurring in *Marchetti* and *Grosso*, *supra*;

> "[W]e know that where the government scheme clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime, it contravenes the privilege [against self-incrimination]." 88 S. Ct. at 716.

is fully applicable to the case at bar.

Not only is the information sought for the express purpose of enforcing the criminal law, but the reporting provisions are also directed against a selective group inherently suspect of criminal activities. It was clearly the assumption of Congress that those who engage in the transactions required to be reported are such a suspect group. Since the disclosure statute imposes no tax on the money being brought into or sent

out of the country, persons with no criminal disposition can be expected to comply with the reporting requirements. In addition, the Secretary's regulation, 31 C.F.R. 103.23 (c) specifically exempts seven categories of persons and institutions dealing in the transport of monetary instruments. The reporting provisions are therefore directed at only those persons whose transportation of more than $5,000 would expose them to criminal liability under the laws of the United States. See, *Leary v. United States*, 395 U.S. 6(1968); *Haynes v. United States*, 390 U.S. 85(1968).

In *U.S. v. San Juan, supra* (at p. 693) the District Court, while agreeing that the underlying purposes of Congress in promulgating the foreign reporting requirements were fundamentally prosecutorial and further that Mrs. San Juan's fears of self-incrimination were neither imaginary nor patently frivolous and that "[c]ompliance with the self-reporting requirements necessarily exposed her to some risk of subsequent prosecution", nevertheless ruled that the reporting requirements were not violative of the Fifth Amendment privilege.

"Ultimately", the District Court said, "the validity or invalidity of the compelled disclosures depends . . . on the relative weight of competing governmental policies and individual liberties". Id. 694. The one critical factor, the Court stressed, which lends substantial weight to the governmental interests in the compelled disclosures when balanced against the individual privilege against self-incrimination is the fact that the reporting requirements involve " 'transactions which take place across national boundaries' ". (citing *Schultz, supra* p. 62). The District Court "believes that the Government's power

to compel incriminating disclosures of persons seeking to cross our borders, like the Government's power to make warrantless searches at the border, *Carroll v. United States*, 267 U.S. 132,154 (1925) is exceptional". *Idem.* 694.

In attaching "substantial weight" to the fact that travellers may be stopped at border crossings for routine examination and warrantless search as an exception to the Fourth Amendment, the District Court suggests that such travellers, including citizens, across international boundaries also lose their privilege against self-incrimination by virtue of such travel alone. The District Court's analysis would carve out an exception to the Fifth Amendment privilege when international travelling is involved.

Such analysis is clearly unwarranted in light of the protection afforded the constitutional right to travel overseas in *Kent v. Dulles*, 357 U.S. 116(1958) and *Aptheker v. Secretary of State*, 378 U.S. 500(1964). It is all the more unwarranted in the light of the fundamental importance attached to the privilege under the Constitution. *Blau v. United States*, 340 U.S. 159; *Hoffman v. United States*, 341 U.S. 479; *Twining v. United States*, 211 U.S. 78.

The District Court in *San Juan* (at 694) analogizes the required reports under customs regulations, such as in *United States v. Vaught*, 434 F. 2d 124 (9th Cir. 1970) or under immigration laws relating to the right of aliens to be in the United States such as in *Laqui v. Imm. & Nat. Service*, 422 F. 2d 807 (7th Cir. 1970), to the reporting requirements here involved.

We submit that there is no analogy between reporting requirements under a statute whose primary purpose, as in the case at bar, is to detect criminal activity, and reporting requirements which are primarily regulatory in nature as under the Tariff Act. The reporting requirements of the Bank Secrecy Act are, rather, more closely akin to those reports required in *Marchetti* and its progeny since both requirements are in essentially criminal areas and are designed to ferret out criminal activity. Just as in *Marchetti*, the reporting requirements under § 1101(a) and (b) and the regulations thereunder should be struck down as constitutionally impermissible under the self-incrimination clause of the Fifth Amendment.

POINT I (b)

Title 31 U.S.C. Sections 1101(a) and 1101(b) and the regulations thereunder 31 C.F.R. Sections 103.23(a) and 103.25(b) of the Bank Secrecy Act of 1970 are unconstitutional in that they violate the Due Process Clause of the Fifth Amendment because they are vague and do not provide for fair notice.

Sections 1101(a) and (b) of the statute are silent as to time or place of filing a report of the transportation of currency in excess of $5,000 into or out of the United States as to the information required to be furnished in such report.

In implementing the statute the Secretary has enacted the following regulations:

> § 103.23 Reports of transportation of currency or monetary instruments.
>
> (a) Each person who physically transports, mails, or ships, or causes to be shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures, or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

§ 103.25 Filing of reports.

(a)* * *

(b) Reports required to be filed by § 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c)* * *

(d) Forms to be used in making the reports required by Section(s) * * * 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

Section 103.23(a) requires a report by the transporter of currency exceeding $5,000.00 into or out of the United States. Unlike §103.23(b) which sets forth the contents of the report required of a *recipient.* §103.23(a) does not advise the *transporter* of what he is required to set forth in the report. All it does, in substance, is to repeat the requirement that a report be filed.

In § 103.25(b) the regulation directs that the required report be filed at the time of entry into or departure from the United States with the Customs officer in charge. Again the regulation is silent and gives no notice to the transporter of the information to be disclosed. Obviously, however, more information is to be required than the fact that over $5,000 is being transported because § 103.25(b) goes on to require that the reports "shall be on forms to be prescribed by the Secretary and *all information* called for in such forms shall be furnished". (Emphasis added)

There is no regulation, however, which prescribes or identifies in any manner the form itself. Unlike the situation in *United States v. Mancuso*, 420 F.2d 566 (2d Cir., 1970) where the regulation prescribes and gives the number of the form and its title to be used in registering under 18 U.S.C. § 1407, Form 3231 "Registration of Certificate of Narcotic Addict or Violator" (Id. ftn. 2, p. 557). Section 103.25(d) of the regulations here in issue merely says that "[f]orms to be used. . .may be obtained" from either any Internal Revenue office or from any office of the Bureau of Customs.

Similarly, a numbered and designated form is provided for by the Bureau of Customs itself in regulation § 148.13 of 19 C.F.R. The regulation in pertinent part reads as follows:

> *§148.13 Written declarations.*
> (a) *When required.* Unless an oral declaration is accepted under §148.12, the declaration required of a person arriving in the United States shall be in writing on Customs Form 6059-B.

> (b) *Completion and presentation of written declarations.* The person arriving in the United States shall complete the information required by Customs Form 6059-B and shall list all articles acquired abroad which are in his possession at the time of arrival . . . .

and it gives a traveler fair and specific notice of what form he must use in making written customs declarations.[1] Such notice and specificity are completely lacking in § 103.25 (b) and (d).

Finally, none of the regulations in issue directs that notice be given to the traveller that if he is transporting more than $5,000 across the border he must file a report or be subject to significant criminal penalties. Lack of such notice requirement is a denial of due process. *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L. Ed. 2d 228 (1958); *United States v. Mancuso, supra; United States v. Jones*, 368 F.2d 795(2d. Cir. 1966).

The regulations on their face require conduct in terms so vague that the traveller must speculate as to what is required of him. Must the traveller going to or coming from Canada with more than $5,000 in cash tell customs he is so doing? If he is not handed a report form by customs, is he nevertheless required either to ask a customs officer for a form or go to a customs office or Internal Revenue office and secure one? If he remains silent on crossing the border is it at his peril?

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[1]Customs Form 6059-B is defendant's Exhibit A. Although it was available in the customs office, it was as noted *supra* at no time presented to the defendant.

A statute or regulation which requires conduct in terms so vague that persons of common intelligence must necessarily guess as to its meaning or application violates due process. *Baggett v. Bullitt*, 377 U.S. 360, 367; *Connally v. General Construction Co.*, 269 U.S. 385, 391.

POINT I(c)

The compelled disclosure under the reporting requirements of § 1101(a) of the Act and the implementing regulations violate the defendant's rights of freedom of association and belief under the First Amendment and her right to privacy guaranteed by that Amendment.

The right under the First Amendment of freedom to associate with others has been protected by the Supreme Court in a series of decisions commencing with *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958), and continuing through *Bates v. Little Rock*, 361 U.S. 516 (1960) to *Baird v. State Bar of Alabama*, 401 U.S. 1 (1971).

Most recently in *Buckley v. Valeo*, ___U.S. ___, 96 S.Ct. 612, 46 L. Ed. 2d 659 (1976), the Court reaffirmed the First Amendment guarantee of freedom of association and privacy of belief set forth in the above cases as well as in *Talley v. California*, 632 U.S. 60 (1960) and *Shelton v. Tucker*, 364 U.S. 479 (1960) saying:

> "[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment". 46 L.Ed. 2d at 713

In *Buckley*, one of the issues raised was the question of the constitutionality of the reporting and disclosure requirements of the Federal Election Campaign Act of 1971, as amended in 1974 (2 USC [illegible], et seq.), involving reporting by political committees of persons whose contributions exceed $100. The name, address, occupation and principal place of business of such persons was to be recorded by the political committee and

filed with the Commission set up by the statute. In addition, each individual who made contributions or expenditures over $100 in a calendar year for the purpose of influencing a federal election or nomination was required to file a statement with the Commission. Violation of the record-keeping and reporting provisions was made punishable by a fine of not more than $1,000 or a prison term of not more than one year, or both.

The Supreme Court in *Buckley*, discussing these disclosure requirements at 46 L.Ed. 2d 714, noted the remarks of Mr. Justice Powell (concurring, and joined by Mr. Justice Blackmun), in *California Bankers Association v. Schultz*, 416 U.S. 21, 78-79 that " 'financial transactions can reveal much about a person's activities, associations, and beliefs' ". Mr. Justice Powell goes on to say "At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy".

The constitutional infirmity of the disclosures required by the statute and regulations at issue becomes evident precisely because it does involve a financial transaction and, more significantly, seeks to discover the identity of the person or entity for whom the transporter was acting.

The District Court points out in *San Juan, supra*, 696 that Form 4790 makes no direct inquiry into the money transporter's "beliefs, or her membership in groups or associations espousing particular beliefs". Question 27 seeks disclosure of defendant's relationship to or identity of the person or entity for whom she was acting as "agent, attorney *or in other capacity* . . ." The question then is clearly susceptible

of a broader interpretation than that claimed for it by the District Court in saying that:

> "At most, the disclosures in Form 4790 would have revealed only an agency relationship of a financial or fiduciary nature existing between Mrs. San Juan and another person or entity" *Idem.*

and the fact that there is no such direct inquiry does not mean that a necessarily truthful reply to Question 27 on Form 4790 does not have the potential of revealing the transporter's associational relationship and privacy of beliefs.

If the transporter were compelled to disclose, for example, that currency over $5,000 was being brought into the United States from abroad "on behalf of" a trade union organization, or the Mormon Church, or an organization dedicated to assist those in the Philippines, or elsewhere, struggling against dictatorship, and that the transporter was acting in the "capacity" of a member thereof, it is evident that such compelled disclosure would force revelation of and intrude into the transporter's privacy of association and belief. Such compelled disclosure undoubtedly has the potential of deterring him from acting "on behalf of" or as a member of the entities described above and has the additional potential of exposing him to harrassment from those opposed to the principles of such entities. Such compelled disclosure has therefore " . . . the potential for substantially infringing the exercise of First Amendment rights". *Buckley*, 46 L. Ed.2d 714.

It should be stressed that the Federal Election Campaign Act is "an intricate statutory scheme . . . to regulate federal election campaigns . . . .". *Buckley*, 46

L. Ed. 684. And in upholding the disclosure provisions of that Act the Supreme Court found that the governmental interest sought to be vindicated by the disclosure requirements was of such magnitude as to justify some of the burden on individual rights of privacy and association guaranteed by the First Amendment and invaded by the disclosure provisions of the statute. The purpose of the disclosure requirement was to protect and preserve the integrity of the Federal election process and to expose to public view the origins and source of the financial support of those seeking office. There is clearly a substantial relation and a relevant correlation between such governmental interest and the information required to be disclosed as to contributors and contributions. *Buckley*, 47 L. Ed. 2nd 713.

On the contrary, and as the District Court in *San Juan* (at page 693) found:

> " . . . [t]he underlying purposes of Congress in promulgating the foreign reporting requirements of the Bank Secrecy Act--purposes which were fundamentally prosecutorial. The stated objective of the Act--to acquire information which would have a ' high degree of usefulness ' in criminal investigations and proceedings, 31 U.S.C. § 1051--was not 'essentially regulatory' ".

Moreover, the relationship between the interest of the government and the disclosures required by §§ 1101(a) and (b) and the regulations thereunder are neither as relevant nor as substantial as the relationship between the government interest and the disclosures

upheld in *Buckley*. Considering that the primary purpose of the Bank Secrecy Act is to catch racketeers and tax evaders, the governmental interest while not of course unsubstantial hardly rises to the dignity of the interest of the government in preserving the sanctity of the federal elective process or the "free functioning of our national institutions" (*Buckley* at 46 L. Ed. 2d 714 quoting from *Communist Party* v. *S.A.C.B.*, 367 U. S. 1.), especially in view of the potential infringement on the guaranteed right of association and privacy of belief embodied in the First Amendment.

POINT II

The District Court committed prejudicial error in denying Defendant's motion to dismiss the information under 12(b)(2) F.R.Cr.P. It also committed prejudicial error in denying Defendant's motion for judgment of acquittal at the close of the Government's case. Both claims of error are predicated on the statements, both written and oral, made repeatedly by the Government that the violation with which the Defendant was charged occurred on the bus when she failed orally to declare the money in her possession.

The Information under which the defendant was charged nowhere sets forth the place where the claimed violation of the statute and regulations occurred. Defendant did not file a motion for a Bill of Particulars assuming that the thrust of the government's case was that the violation took place in the Customs house when Mrs. San Juan was presented with Form 4790 and did not complete it. It would appear that the District Court made a similar assumption.[3]

The government, however, on November 24, 1975 in a memorandum (R. Document 28) setting forth its opposition to defendant's motion to suppress the seized

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[3] See, *San Juan, supra* at 696 where the court discusses Form 4790. At the time of its decision, December 29, 1975 the court appears clearly to have thought that it was the government's contention that the violation, if any, had occurred when defendant failed to fill out Form 4790 in the Customs house.

currency and documents, for the first time made evident that it placed the locus of the crime on the bus at the time Mrs. San Juan did not orally declare to Inspector Johnson that she had more than $5,000 in her possession. The government set forth its theory of the case as follows:

> "... [T]he Government contends that her [Mrs. San Juan's] failure to file a report took place at the time she did not declare the monetary instruments ... on the bus initially ...."[4]

On January 5, 1976, defendant, after receiving the opinion of the District Court in *San Juan*, supra, filed a motion (A.54) under Rule 12(b)(2) of F:R.Cr.P. to dismiss the Information on the ground that the government's contention that the violation took place on the bus when read together with the Information did not charge a crime under the statute and regulations and it should therefore be dismissed.

In its Memorandum (A.56) in opposition dated January 16, 1976 the government reiterated its previously stated theory:

> "The Government does rely on the theory set out in its memorandum [of November 24, 1975] whereupon [sic] it indicated that the violation took place on the bus at the time the defendant failed to declare the monetary instruments to Inspector Johnson."

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[4] The government's rationale for its theory was that: "Any other reading or interpretation of the statute would render it an exercise in futility on the part of Congress." That may be so, but as we point out *infra*, neither the statute, nor the regulations require an oral declaration from a traveller.

At the argument on defendant's motion to dismiss (TRb. 9; A.58) the District Court denied defendant's motion. It also denied defendant's oral motion for a Bill of Particulars (TRb. 9; A.58).

The government continued thereafter to assert its theory of the case in respect to where the violation occurred. In his opening statement to the jury, the Assistant United States Attorney among other things, said:

> "Now Inspector Johnson, we submit, will testify he asked her concerning a couple of brown packages, and she indicated those were books of hers. She indicated she had nothing else she was bringing back with her. There was no discussion of money of any type, no question by Inspector Johnson; no question by Mrs. San Juan about what the situation was with respect to it.
>
> "At this point in time, the Government submits to you, other than the finding of the money which, of course, is proof that the violation was complete right there; that was the violation Mrs. San Juan had failed to declare money which she had in her possession, and in so doing, of course, failed to file any type of report." (TRc. 97-98).

During the trial, defendant in light of the government's claim, objected to any evidence that went beyond the incidents on the bus since such evidence was irrelevant to the government's theory. The court over-ruled the objection (TRc. 117).

Thereafter the District Court heard argument from counsel, out of the jury's presence, as to the admissibility of Government Exhibits 3 and 13, among

others. During the course of the argument, the government reiterated its position on the locus of the violation. The following colloquy (TRc. 247, 248) between the court and Mr. O'Neill, the Assistant United States Attorney, occurred:

> "MR. O'NEILL. Your Honor, for purpose of the record, I don't think I need to go into this again, but we made it *clear as snow. We filed a bill of particulars.* The violation, as far as we are concerned, took place on the bus. The jury is not making a determination that she refused to sign the form. (Emphasis added.)
>
> THE COURT. To elaborate more, the Government has steadfastly insisted the violation took place on the bus. In what respect do you claim it took place on the bus?
>
> MR. O'NEILL. We contend the violation took place on the bus at the point in time when Mrs. San Juan declined to inform the customs inspector she had material with her. She indicated she wasn't filing any type of report. She lied about what the material was. Our position is to that point in time.
>
> THE COURT. This is the only time of the violation, as far as the Government is concerned?
>
> MR. O'NEILL. We believe there are violations when she declined to sign it inside. *However, we indicated we are not charging her with doing that at this point in time.* This information is intended to point to the refusal on the bus, not refusal inside. *We believe she can be charged with that, however, but we are not charging her with that incident in this case.*"(Emphasis added.)

After the government rested, the defendant made a motion for judgment of acquittal (TRc. 293 et seq.). One of the grounds asserted by the defendant for the granting of the motion was that the government's position that the violation of the statute by Mrs. San Juan took place on the bus, was not an offense under the statute.

In response, the government in essence repeated its contention that the statute and regulations were violated by Mrs. San Juan on the bus.

> "What we suggest is that when an individual comes up to the port of entry, makes a declaration to the officer, and when they are done with that, the officer [sic] has not, in some way, indicated the presence of monetary instruments, or a desire to fill out a report, or a request for an opportunity to go inside, and in some manner make out a report, or raise some question with respect to that, they have, at that time, violated the law . Otherwise, the statute would be virtually unenforceable in most respects. It would require anyone found with monetary instruments be given a report and an opportunity to complete it. It would negate the statute if one were not allowed that opportunity.
>
> "We are suggesting, on the bus, when Mrs. San Juan was asked by Mr. Johnson the questions, and when he left her, as far as she knew he was the last United States Government official she was going to deal with—he didn't say anything about coming back or going inside—she raised no questions about it, and we say at that point in time the violation was complete." (TRc. 298-299;A.83)

Finally, in its summation to the jury, the Assistant United States Attorney made crystal clear the government's position. He said:

> "To clarify one thing in the things Mr. Gruber charges as to where did the violation take place, it took place on the bus. To follow any other theory is to render that statute totally meaningless. Mrs. San Juan, at that point in time, made no attempt to file the written report. If she had said to the officer on the bus 'You asked if I purchased or acquired anything, yes, I have $77,500' and he said 'Well, you have to file a report', we wouldn't be here today. That violation took place *right there on that bus and no written report was filed* (TRc. 340)" (Emphasis added).

In light of the government's repeated assertions set forth above, as to the locus of the violation, it is apparent that if the Information had charged such a violation, the Information, as a matter of law, on motion made under Rule 12(b)(2), would have been dismissed since no offense under the statute or the regulations had been committed. The statute and regulations are clear. They require the filing of a written report and not an oral declaration.

It is important at this point to repeat what Mr. O'Neill, the Assistant United States District Attorney, said (TRc. 247):

> "Your Honor, for purpose of the record, I don't think I need to go into this again, but we made it clear as snow. *We filed a bill of particulars.* The violation, as far as we are concerned, took place on the bus. The jury is not making a determination that she refused to sign the form." (Emphasis added.)

In the context of the repeated assertions by the government that the violation had occurred on the bus, the government's statement quoted immediately

above, that a Bill of Particulars was filed, is of significant importance. It was in fact a government admission that all such statements as to the locus of the crime were in fact intended to be a particularization of the Information and in effect a Bill of Particulars that strictly limits the government to proving what it has set forth. See *United States v. Murray*, 297 F.2d 812, 819 (2d Cir. 1962); *U.S. v. Neff*, 212 F.2d 297, 309 (3rd Cir. 1954).

There are no reported cases that we at this point can cite for the proposition that government's statements and memoranda of the character described above can make an Information definite. By analogy, however, to cases where such government's statements and memoranda have in effect particularized an indictment, it is submitted that government's statements in this case have such effect.

For example, in *Demetree v. United States*, 207 F.2d 892, 894 (5th Cir., 1953) an indictment charged evasion of income taxes, the Court pointed out that it was proper for the lower court to deny the defendant a Bill of Particulars because the government in essence had made a general statement of its case to the defendant which sufficiently apprised the defendant of the particulars upon which he could rely.

Again, in *Hernandez v. U.S.*, 352 F.2d 240 (9th Cir. 1965) the District Court denied the defendant a Bill of Particulars. On appeal, the denial was upheld but the Court added "[A] trial memorandum prepared and filed by the Court well advised Hernandez what he had to meet." In effect, the Court of Appeals ruled that the indictment had been particularized by the government's trial memorandum.

We submit therefore that the Information in this case was particularized by the government's statements set forth above and that the Information, when read together with the particularization, charged that the failure to file a report occurred on the bus when Mrs. San Juan failed to tell the inspector that she had more than $5,000 in her possession. Under the statute and the regulations, the Information as made more definite by the government's theory of the case did not state an offense and the District Court should therefore have dismissed the Information on defendant's motion under Rule 12(b)(2). It was prejudicial error for the District Court not to do so or in any event not to grant defendant's oral motion for a Bill of Particulars.

Even if the District Court's denial of the motion to dismiss was correct, its denial of the motion for acquittal was prejudicial error since as a matter of law there was no offense under the statute and regulations. Moreover, the evidence submitted by the government on the issue it claimed to be decisive did not support this theory. The evidence only showed that the defendant did not orally state to Inspector Johnson that she had more than $5,000 currency in her possession. Further, the evidence shows that Inspector Johnson did not ask her whether she had any money in her possession, let alone whether she had more than $5,000 in currency. The evidence further shows that although defendant's Ex. A was available to the customs inspector, he did not present that form to Mrs. San Juan, either then or at any other time. Under these circumstances, the Court was required to grant defendant's motion for judgment of acquittal since even reading

that evidence most favorably to the government, *U.S. v. Brawer*, 482 F.2d 117 (2d Cir. 1973), no willful violation by Mrs. San Juan beyond a reasonable doubt was established.

Finally, it is to be noted that the charge to the jury ruled as a matter of law against the government's claim that the violation had occurred on the bus. The Court said:

> "You will also recall that the attorney for the United States, in his opening statement, advised that it is the Government's contention that the violation with which the defendant is charged occurred on the bus when she arrived in this country. In this regard, there was testimony that when questioned on the bus by a customs officer, the defendant failed to state or advise him that she was carrying a large amount of currency or monetary instruments as they are referred to in the statute. This testimony, if believed by you, standing alone does not constitute proof of the offense charged, as the statute and regulations do not require oral statements or declarations." (TRc. 358; A.103-4)

The court's charge makes evident that defendant's motion of acquittal should have been granted because the government's only claim, up to the point it rested its case before the jury, was that the violation had occurred at no other place than on the bus. It was therefore prejudicial error for the court to deny the motion for acquittal since the only evidence offered by the government as to the occurrences on the bus proved that the statute and the regulations had not been violated and that no offense had been committed by the defendant.

POINT III

The District Court committed prejudicial error in failing to hold that the search and seizure of the currency and the documents was in violation of the Fourth Amendment guarantee against unreasonable searches and seizures and that the seizure was unauthorized by the Statute or any Regulation. The currency and the documents should have been suppressed and returned to the defendant.

At the hearing on October 29, 1975 on defendant's motion to suppress (A.7-51), the Government in opposition to the motion, offered the testimony of customs inspectors Robert M. Johnson, Joan K. McClatchey as well as that of Richard F. Mercier Special Agent for the Customs Service. Their testimony, set forth in full revealed the following relevant facts:

On March 30, 1975 the defendant was a passenger on a bus from Montreal which at about 9:15 A.M. had stopped at the United States customs port of entry at Highgate Springs, Vermont. At that time Mr. Johnson, a United States customs officer, entered the bus for an examination of the passengers. Mrs. San Juan had one piece of luggage on the baggage rack which she, at Johnson's request, unlocked and opened.

Among other items Johnson saw in the luggage were two packages wrapped in brown wrapper or brown envelopes. He did not ask to see what was in the

packages. He felt that he should perhaps go a little further (A. 10) and make a "secondary" examination in the customs area. He wanted to see what the contents of the packages were. He had to find out if there was contraband of any type in the packages, although he had no suspicion that there was such contraband. His only suspicion of the defendant came about because there were two small brown envelopes in the bottom of her bag (A. 27; 33). Asking Mrs. San Juan to accompany him, he picked up the bag and carried it from the bus to the customs house.

In the customs house Johnson opened up the luggage bag and took out one of the brown wrapped packages and found several packs of American money (A. 12). He gave the other package to Inspector McClatchey who opened it and discovered half a dozen letters (A. 31). Johnson estimated that there was over $5,000 in the packages of money he opened (A. 13).

At that point Johnson took and turned over both the package with the money and the package with the letters to Port Director Scott (A. 13; 31). Johnson saw the money two or three hours after he discovered it. It was still on the director's desk (A. 26). The money remained in possession of the Port Director all that day (A. 42; 45). It was retained for investigation (A. 48). The money had been taken from Mrs. San Juan's luggage at the time Johnson found it at approximately 9:30 A.M. and it was never returned to her.

After the money was seized from the defendant and turned over to the Port Director, she was asked by Johnson to fill out a report on Form 4790. She declined. She did not wish to do it at that time (A.14). She wanted the form to be clarified and mentioned having a

lawyer clarify it for her (A. 37). Mrs. San Juan several times asked for the opportunity to telephone her husband. Such opportunity was denied her. The customs agents wanted to find out more before letting her telephone anyone (A. 39).

Mrs. San Juan was interrogated by the two customs inspectors and the Special Agent Mercier from approximately 9:15 A.M. to 2:00 P.M. At about 1:30, after conferring with the United States Attorney who had told him that Mrs. San Juan had had ample time to file the report, Mercier advised Mrs. San Juan that it was too late for her to complete it (A. 47; 52). In response to a question from Mrs. San Juan, Mercier told her that even if she filed the reporting form, the money would not be turned back to her (A. 48; 50). At 1:30 P.M., her filing the report would not have made any difference (A. 52).

The facts set forth demonstrate that the search of defendant's luggage, the so-called secondary search, by Inspector Johnson, was occasioned only by the presence of two brown envelopes in the bottom of defendant's luggage. Johnson had no suspicion that these envelopes contained contraband.

When he was asked on direct examination by the Government (A. 11):

> Q. Would it be fair to say that you were suspicious of the the contents of her bag? Is that the reason you had her come in for the secondary search?

his answer was only:

> "I wanted to see what the contents of the packages were".

Johnson's answer was not responsive. In essence however it was a denial that he was suspicious of the contents of the defendant's luggage. All Johnson wanted was to satisfy his desire to find out what there was in the brown envelopes.

On cross-examination he repeats the answer he gave on direct. He wanted to see what the envelopes contained (A. 27). He had no suspicion that they contained any contraband. He added (A.25) that he had a suspicion of the defendant to a degree "because there was a couple of small brown envelopes or packages, or whatever, in the bottom of her bag . . ."

On the evidence the only reasonable inference to be drawn from Johnson's testimony is that it was his curiosity as to the contents of the envelope, and not any suspicion, which motivated his "secondary search". It is submitted that Johnson's curiosity as to the contents of the parcel or package did not lay the basis for a search satisfying the requirements of the Fourth Amendment.

In *United States v. Hill*, 430 F. 2d 129, 131 (5th Cir. 1970) the court held that customs agents must have a "reasonable suspicion" of possession of unlawfully imported merchandise before they can constitutionally make a warrantless border search. The court in *Hill* relied extensively on *United States v. Glaziou*, 402 F. 2d 8 (2nd Cir. 1968) which stressed the need for the arousal of suspicion in a customs officer before a border search could constitutionally be made.

In *Glaziou* the customs officers originally were suspicious of the defendants because they were observed at dark coming out of a pier gate when the pier area

was apparently deserted. When they were stopped they appeared to be extremely nervous and this "heightened the officer's suspicions". The *Glaziou* court cites with approval such typically "mere suspicion" cases as *Witt v. United States*, 287 F. 2d 389 (9th Cir.); *Morales v. United States*, 378 F. 2d 187 (5th Cir.); and *United States v. Berard*, 281 F. Supp 328 (D.C. Mass., 1968).

While the circuits would appear to be divided on whether customs officials have to have a "reasonable suspicion" or only a "mere suspicion" for a border search, no case suggests that curiosity alone is a sufficient basis for such a search.[5]

The evidence at the suppression hearing demonstrated that Johnson on the bus had no suspicion of Mrs. San Juan. On the contrary, it was only his curiosity as to the contents of the brown envelopes that prompted his "secondary search". It is submitted that on the authority of *Glaziou* such a border search falls within the strictures of the Fourth Amendment.

But even if the search of Mrs. San Juan was valid, the seizure of the currency and the letters in the customs house was illegal being without statutory or regulatory sanction.

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[5]The First Circuit in *United States v. Stornin*, 443 F. 2d 833 (1971) approves the "suspicion" test, but adds that customs officials may search even on a random basis. For this latter proposition it cites *Landau v. United States*, 82 F. 2d 285 (2nd Cir. 1936). But aside from the fact that *Glaziou* postdates *Landau*, the latter case involves a situation where the customs officials had suspicions based upon confidential information that Landau was involved in smuggling operations.

The facts demonstrate that seizure of the currency and letters was made prior to the time the defendant was presented with Form 4790 or asked to fill it out by any of the customs officials. Up to that time, however, no opportunity had been afforded Mrs. San Juan to file a report. It was only *after* the currency and letters were seized by the customs inspectors that Mrs. San Juan was made aware of the reporting requirements and presented with Form 4790 for completion.

It is submitted that § 1102 of the Act, which reads in pertinent part as follows:

> "FORFEITURE — (a) Any monetary instruments which are in the process of any transportation with respect to which any report *required to be filed* under section 231 (1) [31USC §1101] . . . *has not been filed* . . . are subject to *seizure* and *forfeiture* to the United States." (Emphasis added).

does not authorize the seizure of the currency made in the instant case.

Under the language of § 1102, the currency in the case at bar could not be seized, if at all, until after it had been established that a failure to file had occurred. What Johnson did was to stand the statute on its head. He seized the money first, prior to the time a failure to file had been established. Johnson of course did not know at the time of seizure that there had been a failure to file nor that there was to be such a failure.

Authority for Johnson's seizure under the undisputed facts cannot be found in the statute. Nor can such authority be found in the regulation issued by the secretary of the Treasury with respect to § 1102.

31 CFR §103.48 reads in part as follows:

> "*Forfeiture of currency or monetary instruments.*
>
> Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under §103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in §103.25. . . ."

§103.25 referred to in §103.48 provides, to the extent applicable to the instant case, as follows:

> "*Reports of transportation of currency or monetary instruments.*
>
> (a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed, or shipped, currency or other monetary instruments in the aggregate amount exceeding $5,000 on any one occasion . . . into the United States from any place outside the United States, shall make a report thereof . . . ."
>
> "*Filing of reports.*
>
> (a) . . . (b) Reports required to be filed by §103.23(a) shall be filed at the time of the entry into the United States . . . unless otherwise directed or permitted by the Commissioner of Customs. . . ."

Quite clearly §103.48 confers no more authority on customs agents to seize currency prior to the time a failure to report is established than does the statute. Nor is there any authority under any customs regulation in 19 C.F.R. to seize money or letters legally in the country from abroad nor has the government cited any such regulation. There is simply no statutory authority nor authority under any regulations for customs agents to seize the currency at the time they did. Lacking such statutory or regulatory authority the currency and letters should have been suppressed. *U.S. v. Brodzik*, 366 F. Supp 295 (DC WDNY, 1973).

In support of its ruling that the seizure of the letters and other documents was also proper, the district court in *U.S. v. San Juan*, *supra*, at 698 relied on *Warden v. Hayden*, 387 U.S. 294 (1967). In that case the crime of armed robbery had already been committed, and the articles of clothing seized by the police were probative of that criminal conduct. See, *United States v. Robinson*, 414 U.S. 218, 236 (1973). In the case at bar, however, Mrs. San Juan had at the time of the seizure of the currency and the letters not committed any crime.

The district court's denial of defendant's motion to suppress was prejudicial error.

POINT IV(a)

The District Court committed prejudicial error in admitting over defendant's objection Government's Exhibits 3 and 13 in that their potential for unfair prejudice and confusion of the issues far outweighed their probative value.

During the trial the District Court conducted a *voir dire* (A.59-77) on the issue of the admissibility of certain exhibits which the government at that time offered into evidence. They had earlier been marked for identification (TRc. 226). Among these identified exhibits were two unsealed letters (Government Exhibits 3 and 13) found during the search of the defendant in the customs house.

Over the objection of the defendant at the *voir dire* (TRc. 239), the District Court admitted into evidence (TRc. 271,272) most of the identified exhibits including 3 and 13. The defendant, at this time, however, claims prejudicial error only in the admission of the two letters.

The full texts of Exhibits 3 and 13 were read to the jury and are set forth in full in the transcript (TRc. 274,275). They had been offered by the government in the issue of defendant's willfulness and knowledge (TRc. 239) and not for the truth of the matters asserted therein (TRc. 242).

The defendant's objection to the admission of the letters was originally based on their hearsay character and lack of identification of the maker or sender (TRc. 239 *et seq.*). Thereafter. defendant pressed her objection to their admission on the grounds that under

Rule 403 of the Federal Rules of Evidence the letters were prejudicial and would create confusion in the minds of the jury as to the issues (TRc. 244-246).

Even a cursory analysis of the letters fully reveals their extremely prejudicial character and the evident likelihood of their creating confusion in the minds of the jury. They refer to Canadian and U.S. intelligence and the use of a foreign embassy in Canada and by inference suggest the Chinese embassy. They suggest previous activities in Canada and the need for "security" and "secrecy" and refer to an "A.G.", not otherwise identified, who would appear to have the final say in matters. They mention future unspecified activities and talk about the "enemy" and its connection "to our U.G. comrades".

The potential for inducing emotions of prejudice and hostility against the defendant and for confusing the jury on the narrow issue before them is self-evident. Even if the letters had some probative value on the question of defendant's state of mind, it was plain and prejudicial error for the court to admit them. See, *U.S. v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L Ed 2d 99, 107 (1975), *U.S. v. Bowie*, 360 F. 2d 1 (2nd Cir., 1966), *U.S. v. Burch*, 490 F. 2d 1300 (8th Cir., 1974).

POINT IV(b)

It was prejudicial error for the District Court to fail to charge, in accordance with defendant's Request No. 6 on the issue of willfulness, that before the jury could convict her it had to find beyond a reasonable doubt that she had an evil motive to evade the obligation to file a written report.

Defendant's Request No. 6 on the issue of willfulness is set forth in the Appendix at A.94.

The District Court charged as follows:

> "You must also find that the defendant acted willfully in failing to file a report of the currency she was transporting. An act is willfully done, if it is done knowingly and deliberately. A failure to act is done willfully, if it is done voluntarily and intentionally and with specific intent to fail to do something the law requires. In this case, in order to find the defendant guilty of willful failure to file the required report, you must find that she knew that the report was required to be filed, and she intentionally and deliberately failed to comply with that requirement, or acted in deliberate disregard of the requirement.
>
> In this regard, it is not necessary for the Government to prove that the defendant knew that the law imposed a duty upon her to file a report of her transportation of currency. Unless and until outweighted by evidence in the case to the contrary, there is a presumption that every person knows what the law requires to be done. However, evidence that the defendant acted or failed to act because she

> was ignorant of the law may be considered by you in determining whether or not she acted, or failed to act, with specific intent to disobey the reporting requirement, as charged." (TRc. 359-360)

The defendant excepted to the charge because it did not include the question of evil motive (TRc. 362-363).

The District Court's use of the words "intentionally and deliberately failed to . . . or acted" in "deliberate disregard" of the reporting requirements was taken from the charge in *U.S. v. Gentile*, 551 F.2d 461 (2d Cir. 1976).

But in *Gentile* the "deliberate disregard" expression referred not to *willfulness* but rather to the question of *knowledge*. *Gentile* 470. On the issue of "willfulness" the lower court, as set forth in *Gentile*, charged that "willfully" means to act "intentionally or with a bad purpose . . ." and this Court approved that charge as to willfulness. Such approval was consonant with the definition of "willfully" as requiring the doing of an act with "bad purpose or evil motive" set forth in *U.S. v. Murdoch*, 290 U.S. 389(1933) and thereafter followed in *U.S. v. Bishop*, 412 U.S. 346,361(1973).

The entire record in the case at bar reveals that the defendant first knew of the reporting requirements only at the time she was questioned in the customs house. The record also reveals that she was uncertain as to whether or not she should fill out the form presented to her there. At the most, the record reveals that she disregarded the urgings or the insistance of the customs agents that she fill it out at that time.

And as already noted above, she was told that by approximately 1:30 P.M. she had had sufficient time to do so.

Under these circumstances, the issue as to whether she had an evil motive or bad purpose was of crucial importance at the trial. If the jury had been charged in accordance with the defendant's request, no evil motive or bad purpose could have been found beyond a reasonable doubt. The Court's failure to charge in accordance with defendant's request was therefore prejudicial error.

CONCLUSION

The judgment of conviction should be reversed and the matter remanded to the District Court for the entry of a judgment of acquittal.

Respectfully submitted,

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August 21, 1976

ADDENDUM TO BRIEF

STATUTES INVOLVED

31 U.S.C. § 1051-1122.

§ 1051. *Congressional declaration of purpose*

It is the purpose of this chapter to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

Pub.L. 91-508, Title II, § 202, Oct. 26, 1970, 84 Stat. 1118.

* * *

§ 1053. *Regulations*

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this chapter.

Pub.L. 91-508, Title II, § 204, Oct. 26, 1970, 84 Stat. 1120.

* * *

§ 1059. *Additional criminal penalty in certain cases*

Whoever willfully violates any provision of the chapter where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title II, § 210, Oct. 26, 1970, 84 Stat. 1121.

* * *

§ 1061. *Availability of information to other Federal agencies*

The Secretary shall, upon such conditions and pursuant to such procedures as he may by regulation prescribe, make any information set forth in reports filed pursuant to this chapter available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government on the request of the head of such department or agency.

Pub.L. 91-508, Title II, § 212, Oct. 26, 1970, 84 Stat. 1124.

* * *

Subchapter III.—Reports of Exports and Imports of Monetary Instruments

§ 1101. *Reports—Persons required to file*

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place with the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

Contents of filed reports

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

* * *

§ 1102. *Forfeiture*

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.

Pub.L. 91-508, Title II, § 233, Oct. 26, 1970, 84 Stat. 1123.

* * *

§ 1105. *Enforcement authority*

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 1101 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

Pub.L. 91-508, Title II, § 235, Oct. 26, 1970, 84 Stat. 1123.

Regulations Involved

31 C.F.R. § 103

Subpart B—Reports Required to Be Made

§ 103.21 *Determination by the Secretary*

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

* * *

§ 103.23 *Report of Transportation of Currency or Monetary Instruments*

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under

subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

* * *

§ 103.25 *Filing of Reports*

* * *

(b) Reports required to be filed by Section 103.23 (a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23 (b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of

Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

* * *

§103.43 *Availability of Information*

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor.

* * *

§ 103.46 *Enforcement*

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

* * *

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48.

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

* * *

§ 103.48 *Forfeiture of Currency or Monetary Instruments*

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 *Criminal Penalty*

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be im-

prisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§103.50 *Enforcement Authority with respect to Transportation of Currency or Monetary Instruments*

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places, or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 *Effective Date*

This part shall become effective July 1, 1972.

DOCKET NO. 76-1300

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

VS.

DELIA AGUILAR SAN JUAN

DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

This is to certify that three copies of the Brief and Appendix of the Defendant-Appellant Delia Aguilar San Juan in the above matter were deposited in the United States Post Office, postage prepaid, Stamford, Connecticut addressed to George W. F. Cook, United States Attorney, District of Vermont, Rutland, Vermont 05701, certified mail return receipt requested on August 23, 1976.

Samuel Gruber

Samuel Gruber, Esq.
218 Bedford Street
Stamford, Connecticut 06901

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